

THE STATE OF TEXAS §
COUNTY OF HARRIS §

4600011683
2012-0733

I. PARTIES

A. Address

THIS AGREEMENT FOR ONLINE HOMEWORK SERVICES ("Agreement") is made on the Countersignature Date between the **CITY OF HOUSTON, TEXAS** ("City"), a municipal corporation, and **BRAINFUSE, INC.**, ("Contractor"), a Delaware Corporation, authorized to do business in Texas.

The initial addresses of the parties, which one party may change by giving written notice to the other party, are as follows:

| <u>City</u> | <u>Contractor</u> |
|---|---|
| City Purchasing Agent or Designee City of Houston 901 Bagby Conference Room 1 Houston, Texas 77002 | Brainfuse, Inc. 271 Madison Avenue New York, NY 10016 (1-866) 272-4638 |

The Parties agree as follows:

B. Table of Contents

This Agreement consists of the following sections:

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- B. Fee Schedule**
- C. Equal Employment Compliance**
- D. Drug Policy Compliance Agreement**
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- F. Drug Policy Compliance Declaration**
- G. Pay or Play Compliance**

C. Parts Incorporated

The above-designated sections and exhibits are incorporated into this Agreement.

D. Controlling Parts

If a conflict among the sections and exhibits arises, the sections control over the exhibits.

E. Signatures

The Parties have executed this Agreement in multiple copies, each of which is an original.

ATTEST/SEAL


BRAINFUSE, INC.

By: 

Name: Mohammed Mujumder

Title: Notary Public


MOHAMMED MUJUMDER MSS LLB
Notary Public, State of New York
ATTEST/SEAL: 4962808
Qualified in Bronx County
Commission Expires Feb. 26, 2014


City Secretary

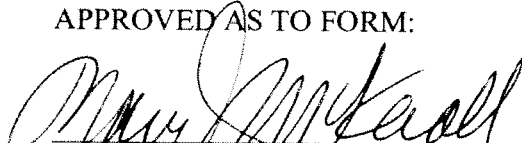
APPROVED:


City Purchasing Agent

APPROVED:


Director, Houston Public Library

APPROVED AS TO FORM:


Sr. Assistant City Attorney
L.D. File No. 0411200005001

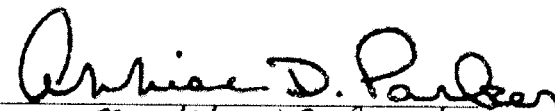
By: 

Name: Alex Szuden

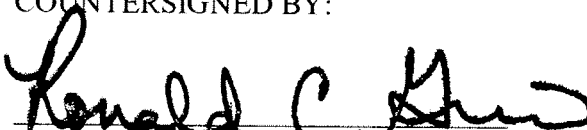
Title: Director

CITY OF HOUSTON, TEXAS

Signed by:


Mayor Matthew D. Appel

COUNTERSIGNED BY:


City Controller Lennell Poll

DATE COUNTERSIGNED:

8-31-12

II. DEFINITIONS

As used in this Agreement, the following terms have the meanings set out below:

"Agreement" means this contract between the Parties, including all exhibits and any written amendments authorized by City Council and Contractor.

"City" is defined in the preamble of this Agreement and includes its successors and assigns.

"Contractor" is defined in the preamble of this Agreement and includes its successors and assigns.

"Countersignature Date" means the date shown as the date countersigned on the signature page of this Agreement.

"Deliverables" mean all tangible items provided by Contractor to the City under this Agreement.

"Director" means the Director of the Library Department, or the person he or she designates.

"Parties" mean all the entities set out in the Preamble who are bound by this Agreement.

III. DUTIES OF CONTRACTOR

A. Scope of Services

Services in General

In consideration of the payments specified in this Agreement, Contractor shall provide all labor, material and supervision necessary to perform the services described in Exhibit "A".

B. RELEASE

CONTRACTOR AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S SOLE OR CONCURRENT NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY.

C. INDEMNIFICATION

CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:

- (1) CONTRACTOR'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', CONTRACTORS', OR SUBCONTRACTORS' (COLLECTIVELY IN NUMBERED PARAGRAPHS 1-3, "CONTRACTOR") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;
- (2) THE CITY'S AND CONTRACTOR'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT; AND
- (3) THE CITY'S AND CONTRACTOR'S ACTUAL OR ALLEGED STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT.

CONTRACTOR SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY HARMLESS DURING THE TERM OF THIS AGREEMENT AND FOR FOUR YEARS AFTER THE AGREEMENT TERMINATES. CONTRACTOR'S INDEMNIFICATION IS LIMITED \$500,000 PER OCCURRENCE. CONTRACTOR SHALL NOT INDEMNIFY THE CITY FOR THE CITY'S SOLE NEGLIGENCE.

D. INDEMNIFICATION – PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET INFRINGEMENT

CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL CLAIMS OR CAUSES OF ACTION BROUGHT AGAINST THE CITY ALLEGING THAT THE CITY'S USE OF ANY EQUIPMENT, SOFTWARE, PROCESS, OR DOCUMENTS CONTRACTOR FURNISHES DURING THE TERM OF THIS AGREEMENT

INFRINGES ON A PATENT, COPYRIGHT, OR TRADEMARK, OR MISAPPROPRIATES A TRADE SECRET. CONTRACTOR SHALL PAY ALL COSTS (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS, AND INTEREST) AND DAMAGES AWARDED.

CONTRACTOR SHALL NOT SETTLE ANY CLAIM ON TERMS WHICH PREVENT THE CITY FROM USING THE EQUIPMENT, SOFTWARE, PROCESS, AND DOCUMENTS WITHOUT THE CITY'S PRIOR WRITTEN CONSENT.

WITHIN 60 DAYS AFTER BEING NOTIFIED OF THE CLAIM, CONTRACTOR SHALL, AT ITS OWN EXPENSE, EITHER (1) OBTAIN FOR THE CITY THE RIGHT TO CONTINUE USING THE EQUIPMENT, SOFTWARE, PROCESS, AND DOCUMENTS OR, (2) REPLACE OR MODIFY THEM WITH PRODUCTS BOTH PARTIES AGREE ARE COMPATIBLE AND FUNCTIONALLY EQUIVALENT. IF NONE OF THESE ALTERNATIVES IS REASONABLY AVAILABLE, THE CITY SHALL RETURN THE EQUIPMENT, SOFTWARE, OR DOCUMENTS, OR DISCONTINUE THE PROCESS, AND CONTRACTOR SHALL REFUND THE PURCHASE PRICE.

CONTRACTOR SHALL REQUIRE ALL OF ITS SUBCONTRACTORS (AND THEIR SUBCONTRACTORS) TO RELEASE AND INDEMNIFY THE CITY TO THE SAME EXTENT AND IN SUBSTANTIALLY THE SAME FORM AS ITS RELEASE AND INDEMNITY TO THE CITY.

E. INDEMNIFICATION PROCEDURES

(1) Notice of Claims. If the City or Contractor receives notice of any claim or circumstances, which could give, rise to an indemnified loss, the receiving party shall

give written notice to the other party within 30 days. The notice must include the following:

- a. a description of the indemnification event in reasonable detail,
- b. the basis on which indemnification may be due, and
- c. the anticipated amount of the indemnified loss.

(2) This notice does not estop or prevent the City from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If the City does not provide this notice within the 30-day period, it does not waive any right to indemnification except to the extent that Contractor is prejudiced, suffers loss, or incurs expense because of the delay

(3) Defense of Claim

- a. Assumption of Defense. Contractor may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to the City. Contractor shall then control the defense and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, Contractor must advise the City as to whether or not it will defend the claim. If Contractor does not assume the defense, the City shall assume and control the defense, and all defense expenses constitute an indemnification loss.
- b. Continued Participation. If Contractor elects to defend the claim, the City may retain separate counsel to participate in (but not control) the defense and to participate in (but not control) any settlement negotiations. Contractor may settle the claim without the consent or agreement of the City, unless it (i) would result in injunctive relief or other equitable remedies or otherwise

require the City to comply with restrictions or limitations that adversely affect the City, (ii) would require the City to pay amounts that Contractor does not fund in full, (iii) would not result in the City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

F. Insurance

(1) Contractor shall maintain in effect certain insurance coverage, which is described as follows) Risks and Limits of Liability. Contractor shall maintain the following coverages and limits of liability:

| <u>(Coverage)</u> | <u>(Limit of Liability)</u> |
|--|--|
| Workers' Compensation | Statutory for Workers' Compensation |
| Employer's Liability | Bodily Injury by accident \$100,000 (each accident) Bodily Injury by Disease \$100,000 (policy limit) Bodily Injury by Disease \$100,000 (each employee) |
| Commercial General Liability: Including Broad Form Coverage, Contractual Liability, Bodily and Personal Injury, and Completed Operations | Bodily Injury and Property Damage, Combined Limits of \$500,000 each Occurrence and \$1,000,000 aggregate |
| Automobile Liability Insurance (for vehicles Contractor uses in performing under this Agreement, including Employer's Non-Owned and Hired Auto Coverage)* | \$1,000,000 combined single limit |

*If Contractor will not use vehicles in performing Contractor's duties under this Agreement Contractor shall furnish Director a letter stating that no vehicles will be used. If in the future contractor does use vehicles in performing its duties Contractor shall furnish City proof of automobile liability insurance as described above.

Defense costs are excluded from the face amount of the policy.
Aggregate Limits are per 12-month policy period
unless otherwise indicated

- (2) Form of Policies. The Director may approve the form of the insurance policies, but nothing the Director does or fails to do relieves Contractor from its duties to provide the required coverage under this Agreement. The Director's actions or inactions do not waive the City's rights under this Agreement
- (3) Issuers of Policies. The issuer of any policy (1) shall have a Certificate of Authority to transact insurance business in Texas or (2) shall be an eligible non-admitted insurer in the State of Texas and have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition Best's Key Rating Guide.
- (4) Insured Parties. Each policy, except those for Workers' Compensation and Employer's Liability, must name the City (and its officers, agents, and employees) as Additional Insured parties on the original policy and all renewals or replacement
- (5) Deductibles. Contractor shall be responsible for and pay any claims or losses to the extent of any deductible amounts and waives any claim it may have for the same against the City, its officers, agents, or employee.
- (6) Cancellation. Contractor shall not cancel, materially modified, or non-renew any policy unless the Contractor gives the Director 30 days' advance written notice. Contractor shall give written notice to the Director within five days of the date on which total claims by any party against Contractor reduce the aggregate amount of coverage below the amounts required by this Agreement. In the alternative, the policy may contain an endorsement establishing a policy aggregate for the particular project or location subject to this Agreement.

- (7) Subrogation. Each policy must contain an endorsement to the effect that the issuer waives any claim or right of subrogation to recover against the City, its officers, agents, or employee.
- (8) Endorsement of Primary Insurance. Each policy, except Workers' Compensation, must contain an endorsement that the policy is primary to any other insurance available to the Additional Insured with respect to claims arising under this Agreement.
- (9) Liability for Premium. Contractor shall pay all insurance premiums, and the City shall not be obligated to pay any premiums.
- (10) Proof of Insurance. On the Effective Date and at any time during the Term of this Agreement, Contractor shall furnish the Director with Certificates of Insurance, along with an Affidavit from Contractor confirming that the Certificates accurately reflect the insurance coverage maintained. If requested in writing by the Director, Contractor shall furnish the City with certified copies of Contractor's actual insurance policies. Contractor shall continuously and without interruption, maintain in force the required insurance coverages specified in this Section. If Contractor does not comply with this requirement, the Director, at his or her sole discretion, may
- a. immediately suspend Contractor from any further performance under this Agreement and begin procedures to terminate for default, or
 - b. purchase the required insurance with City funds and deduct the cost of the premiums from amounts due to Contractor under this Agreement.

(11) The City shall never waive or be estopped to assert its right to terminate this Agreement because of its acts or omissions regarding its review of insurance documents.

(12) Other Insurance. If requested by the Director, Contractor shall furnish adequate evidence of Social Security and Unemployment Compensation Insurance, to the extent applicable to Contractor's operations under this Agreement.

G. Licenses and Permits

Contractor shall obtain, maintain, and pay for all licenses, permits, and certificates required by any statute, ordinance, rule, or regulation.

H. Compliance with Laws

Contractor shall comply with all applicable state and federal laws and regulations and the City Charter and Code of Ordinances.

I. Compliance with Equal Opportunity Ordinance

Contractor shall comply with City's Equal Employment Opportunity Ordinance as set out in Exhibit "C".

J. Contractor Performance

Contractor shall make citizen satisfaction a priority in providing services under this contract. Contractor's employees should be trained to be customer-service oriented and to positively and politely interact with citizens when performing contract services. Contractor's employees should be clean, courteous, efficient and neat in appearance at all times and committed to offering the highest degree of service to the public. If, in the Director's determination, the Contractor is not interacting in a positive and polite manner with citizens, the Contractor shall take all remedial steps to conform to the standards set by this contract and is subject to termination for breach of contract.

K. Pay or Play

The requirements and terms of the City of Houston Pay or Play program, as set out in Executive Order 1-7, are incorporated into this Agreement for all purposes. Contractor has reviewed Executive Order No. 1-7 and shall comply with its terms and conditions as they are set out at the time of City Council approval of this Agreement.

L. Drug Detection and Deterrence

It is the policy of the City to achieve a drug-free workforce and to provide a workplace that is free from the use of illegal drugs and alcohol. It is also the policy of the city that the manufacture, distribution, dispensation, possession, sale or use of illegal drugs or alcohol by Contractors while on City premises is prohibited. Accordingly, effective September 1, 1994, and pursuant to the Mayor's Executive Order 1-31, Contractor must certify to its compliance with this policy. Exhibits D, E and F contain the standard language, which will be used in each contract for labor or services as well as the Executive Order 1-31 disclosure and compliance forms.

IV. DUTIES OF CITY

A. City's Assigned Responsibilities

The City shall and Contractor shall accept fees at the annual price provided in Exhibit "B" for all services rendered by Contractor pursuant to this Agreement. Fees shall be paid monthly as set out in Section IV. B. Payment Terms.

B. Payment Terms

The City shall pay monthly on the basis of invoices submitted by Contractor and approved by the Director, in the amount of \$14,250.00 per month. The City shall pay Contractor within 30 days of the receipt and approval of the invoices as described in Exhibit "B". If the City for any reason, including lack of supporting documentation, disputes any items in any invoices

submitted by the Contractor the City shall temporarily delete the disputed item and pay the remaining amount of the invoice. The City shall promptly notify the Contractor of the dispute and request clarification and/or remedial action. After any dispute shall have been settled, the Contractor shall include the disputed amount on a subsequent regularly scheduled invoice or on a special invoice for the disputed item only.

C. Taxes

The City is exempt from payment of Federal Excise and Transportation Tax and Texas Limited Sales and Use Tax. Contractor's invoices to the City must not contain assessments of any of these taxes. The Director will furnish the City's exemption certificate and federal tax identification number to Contractor if requested.

D. Limit of Appropriation

- (1) The City's duty to pay money to Contractor under this Agreement is limited in its entirety by the provisions of this Section.
- (2) In order to comply with Article II, Sections 19 and 19a of the City's Charter and Article XI, Section 5 of the Texas Constitution, the City has appropriated and allocated the sum of \$143,000.00 to pay money due under this Agreement (the "Original Allocation"). The executive and legislative officers of the City, in their discretion, may allocate supplemental funds for this Agreement, but they are not obligated to do so. Therefore, the parties have agreed to the following procedures and remedies
- (3) The City makes a Supplemental Allocation by issuing to Contractor a Service Release Order, or similar form approved by the City Controller, containing the language set out below. When necessary, the Supplemental Allocation shall be approved by motion or ordinance of City Council.

NOTICE OF SUPPLEMENTAL ALLOCATION OF FUNDS

By the signature below, the City Controller certifies that, upon the request of the Director, the supplemental sum set out below has been allocated for the purposes of the Agreement out of funds appropriated for this purpose by the City Council of the City of Houston. This supplemental allocation has been charged to such appropriation.

\$ _____

- (4) City Council delegates to the Director the authority to approve up to \$712,000.00 in supplemental allocations for this Agreement without returning to Council.
- (5) The Original Allocation plus all supplemental allocations are the Allocated Funds. The City shall never be obligated to pay any money under this Agreement in excess of the Allocated Funds. Contractor must assure itself that sufficient allocations have been made to pay for services it provides. If Allocated Funds are exhausted and, Contractor's only remedy is suspension or termination of its performance under this Agreement, and it has no other remedy in law or in equity against the City and no right to damages of any kind.

V. TERM AND TERMINATION

A. Contract Term

This Agreement is effective on the Countersignature Date and remains in effect for one year unless sooner terminated under this Agreement.

B. Renewals

Upon expiration of the Initial Term, and so long as the City makes sufficient supplemental allocations, this Agreement will be automatically renewed for four successive one-year terms on the same terms and conditions. If the Director or the City chooses not to renew

this Agreement, the Director shall notify Contractor of non-renewal at least 30 days before the expiration of the then-current term.

C. Termination for Convenience by City

The Director may terminate this Agreement at any time by giving 60 days written notice to Contractor. The City's right to terminate this Agreement for convenience is cumulative of all rights and remedies, which exist now or in the future.

On receiving the notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement and cancel all existing orders and subcontracts that are chargeable to this Agreement. As soon as practicable after receiving the termination notice, Contractor shall submit an invoice showing in detail the services performed under this Agreement up to the termination date. The City shall then pay the fees to Contractor for services actually performed, but not already paid for, in the same manner as prescribed in Section IV unless the fees exceed the allocated funds remaining under this Agreement.

TERMINATION OF THIS AGREEMENT AND RECEIPT OF PAYMENT FOR SERVICES RENDERED ARE CONTRACTOR'S ONLY REMEDIES FOR THE CITY'S TERMINATION FOR CONVENIENCE, WHICH DOES NOT CONSTITUTE A DEFAULT OR BREACH OF THIS AGREEMENT. CONTRACTOR WAIVES ANY CLAIM (OTHER THAN ITS CLAIM FOR PAYMENT AS SPECIFIED IN THIS SECTION), IT MAY HAVE NOW OR IN THE FUTURE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM THE CITY'S TERMINATION FOR CONVENIENCE.

D. Termination for Cause by City

If Contractor defaults under this Agreement, the Director may either terminate this Agreement or allow Contractor to cure the default as provided below. The City's right to

terminate this Agreement for Contractor's default is cumulative of all rights and remedies, which exist now or in the future. Default by Contractor occurs if:

- (1) Contractor fails to perform any of its duties under this Agreement;
- (2) Contractor becomes insolvent;
- (3) all or a substantial part of Contractor's assets are assigned for the benefit of its creditors; or
- (4) a receiver or trustee is appointed for Contractor.

If a default occurs, the Director shall deliver a written notice to Contractor describing the default and the termination date. The termination date shall be at least 30 days after the date given in the written notice. The Director, at his or her sole option, may extend the termination date to a later date. If the Director allows Contractor to cure the default and Contractor does so to the Director's satisfaction before the termination date, then the termination is ineffective. If Contractor does not cure the default before the termination date, then the Director may terminate this Agreement on the termination date, at no further obligation of the City.

To effect final termination, the Director must notify Contractor in writing. After receiving the notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement, and promptly cancel all orders or subcontracts chargeable to this Agreement.

E. Termination for Cause by Contractor

Contractor may terminate its performance under this Agreement only if the City defaults and fails to cure the default after receiving written notice of it. Default by the City occurs if the City fails to perform one or more of its material duties under this Agreement. If a default occurs and Contractor wishes to terminate the Agreement, then Contractor must deliver a written notice to the Director describing the default and the proposed termination date. The date must be at

least 30 days after the Director receives notice. Contractor, at its sole option, may extend the proposed termination date to a later date. If the City cures the default before the proposed termination date, then the proposed termination is ineffective. If the City does not cure the default before the proposed termination date, then Contractor may terminate its performance under this Agreement on the termination date.

To effect final termination, Contractor must notify the City in writing. After receiving the notice, the City shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement.

F. Effect of Termination

In the event that this Agreement is terminated, Contractor shall be obligated to refund to the City all payments made by the City to Contractor for items or services which Contractor was to provide under this Agreement and which the City paid for in advance but which Contractor has not provided as of the termination date.

VI. MISCELLANEOUS

A. Independent Contractor

Contractor shall perform its obligations under this Agreement as an independent contractor and not as an employee of the City.

B. Force Majeure

- (1) Timely performance by both parties is essential to this Agreement. However, neither party is liable for delays or other failures to perform its obligations under this Agreement to the extent the delay or failure is caused by Force Majeure. Force Majeure means fires, floods, explosions, and other acts of God, war, terrorist acts against the City or Contractor, riots, court orders, and the acts of superior governmental or military authority.

- 4
- (2) This relief is not applicable unless the affected party does the following:
- a. uses due diligence to remove the Force Majeure as quickly as possible
 - b. provides the other party with prompt written notice of the cause and its anticipated effect; and
 - c. provides the other party with written notice describing the actual delay or non-performance incurred within 7 days after the Force Majeure ceases.
- (3) The City may perform contract functions itself or contract them out during periods of Force Majeure. Such performance does not constitute a default or breach of this Agreement by the City.
- (4) If the Force Majeure continues for more than 30 days, the Director may terminate this Agreement by giving 7 days' written notice to Contractor. This termination is a termination for convenience. CONTRACTOR WAIVES ANY CLAIM IT MAY HAVE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM THE TERMINATION EXCEPT FOR AMOUNTS DUE UNDER THE AGREEMENT AT THE TIME OF THE TERMINATION.
- (5) Contractor is not relieved from performing its obligations under this Agreement due to a strike or work slowdown of its employees. Contractor shall employ only fully trained and qualified personnel during a strike.

C. Severability

If any part of this Agreement is for any reason found to be unenforceable, all other parts remain enforceable unless the result materially prejudices either party.

D. Entire Agreement

This Agreement merges the prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other agreements, assurances, conditions,

covenants (express or implied), or other terms of any kind, exist between the Parties regarding this Agreement.

E. Written Amendment

Unless otherwise specified elsewhere in this Agreement, this Agreement may be amended only by written instrument executed on behalf of the City (by authority of an ordinance adopted by the City Council) and Contractor. The Director is only authorized to perform the functions specifically delegated to him or her in this Agreement.

F. Applicable Laws

This Agreement is subject to the laws of the State of Texas, the City Charter and Ordinances, the laws of the federal government of the United States, and all rules and regulations of any regulatory body or officer having jurisdiction.

Venue for any litigation relating to this Agreement is Harris County, Texas.

G. Notices

All notices to either party to the Agreement must be in writing and must be delivered by hand, facsimile, United States registered or certified mail, return receipt requested, United States Express Mail, Federal Express, Airborne Express, UPS or any other national overnight express delivery service. The notice must be addressed to the party to whom the notice is given at its address set out in Section I of this Agreement or other address the receiving party has designated previously by proper notice to the sending party. The party giving the notice must pay postage or delivery charges.

H. Captions

Captions contained in this Agreement are for reference only, and, therefore, have no effect in construing this Agreement. The captions are not restrictive of the subject matter of any section in this Agreement.

I. Non-Waiver

If either party fails to require the other to perform a term of this Agreement, that failure does not prevent the party from later enforcing that term and all other terms. If either party waives the other's breach of a term, that waiver does not waive a later breach of this Agreement.

An approval by the Director, or by any other employee or agent of the City, of any part of Contractor's performance does not waive compliance with this Agreement or establish a standard of performance other than that required by this Agreement and by law. The Director is not authorized to vary the terms of this Agreement.

J. Inspections and Audits

City representatives shall have the right to perform, or have performed, (1) audits of Contractor's books and records, related to this Agreement, and (2) inspections of all places where work is undertaken in connection with this Agreement. Contractor shall keep its books and records available for this purpose for at least 3 years after this Agreement terminates. This provision does not affect the applicable statute of limitations.

K. Enforcement

The City Attorney or his or her designee may enforce all legal rights and obligations under this Agreement without further authorization. Contractor shall provide to the City Attorney all documents and records described in Section J that the City Attorney requests to assist in determining Contractor's compliance with this Agreement, with the exception of those documents made confidential by federal or State law or regulation.

L. Ambiguities

If any term of this Agreement is ambiguous, it shall not be construed for or against any party on the basis that the party did or did not write it.

M. Survival

The City and Contractor shall remain obligated to the other party under all clauses of this Agreement that expressly or by their nature extend beyond the expiration or termination of this Agreement, including but not limited to, the indemnity provisions.

N. Publicity

Contractor shall make no announcement or release of information concerning this Agreement unless the release has been submitted to and approved, in writing, by the Director. All marketing, promotional, and other communications by the Library that mention or refer to Live Homework Help must include the “Powered by Brainfuse” logo. This includes all Library web pages that refer to or link to the Live Homework Help site. In circumstances where the use of graphic logos may be inappropriate (such as press releases), the text phrase “Powered by Brainfuse” may be substituted.

O. Risk of Loss

Unless otherwise specified elsewhere in this Agreement, risk of loss or damage for each Product passes from Contractor to the City upon acceptance by the City.

P. Parties In Interest

This Agreement does not bestow any rights upon any third party, but binds and benefits the City and Contractor only.

Q. Successors and Assigns

This Agreement binds and benefits the Parties and their legal successors and permitted assigns; however, this provision does not alter the restrictions on assignment and disposal of assets set out in the following paragraph. This Agreement does not create any personal liability on the part of any officer or agent of the City.

R. Business Structure and Assignments

Contractor shall not assign this Agreement at law or otherwise or dispose of all or substantially all of its assets without the Director's prior written consent. This Agreement may not be assigned by a Party hereto without the prior written consent of the other Party; provided that Contractor may assign its rights and obligations under this Agreement (without the prior written consent of City) to any surviving Party in a merger or consolidation in which Contractor is a Party or to any Party that acquires all or substantially of Contractor's capital stock or assets. Nothing in this clause, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. In the case of such an assignment, Contractor shall immediately furnish the City with proof of the assignment and the name, telephone number, and address of the Assignee and a clear identification of the fees to be paid to the Assignee.

Contractor shall not delegate any portion of its performance under this Agreement without the Director's prior written consent.

S. Remedies Cumulative

Unless otherwise specified elsewhere in this Agreement, the rights and remedies contained in this Agreement are not exclusive, but are cumulative of all rights and remedies, which exist now or in the future. Neither party may terminate its duties under this Agreement except in accordance with its provision.

T. Contractor Debt

IF CONTRACTOR, AT ANY TIME DURING THE TERM OF THIS AGREEMENT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT

CONTRACTOR HAS INCURRED A DEBT, SHE SHALL IMMEDIATELY NOTIFY CONTRACTOR IN WRITING. IF CONTRACTOR DOES NOT PAY THE DEBT WITHIN 30 DAYS OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FOR ANY PAYMENTS OWED TO CONTRACTOR UNDER THIS AGREEMENT, AND CONTRACTOR WAIVES ANY RECOURSE THEREFOR.

EXHIBIT "A"

SCOPE OF SERVICES

Description of Service:

Contractor shall grant Students ("Users") access to a Live Home Assistance (LHA) Web site after authentication (verifying that user is a HPL card holder) has occurred within the library's system. Each student will have the opportunity to select the subject in which they need tutoring (e.g. Math, Science, Social Sciences, and English). This requires the student to indicate their grade level (K-12, or college introductory), and allows the student to get connected to a qualified service provider. Learning must take place in web-based, online classroom.

LHA Requirements:

Contractor shall provide:

1. Unlimited access to Live Homework Assistance;
2. Unlimited simultaneous users;
3. Unlimited access per student;
4. Core academic assistance in Math, Science, Social Studies and English from K to 12th grade level and introductory college courses;
5. Access to support tools for adult learner including GED study assistance, resume workshops, and similar services;
6. Confidentiality for students;
7. Non-disclosure of any personal information that would permit identification of an individual without obtaining the prior written consent of that individual (or that individual's legal guardian) unless contractor believes that an immediate disclosure may be necessary to protect someone's physical safety (for example if a user tells a provider that he "has a gun and is going to shoot someone") or if so required by a court or administrative authority of competent jurisdiction;
8. One-to-one connection between student and service contractor shall be provided in real time;
9. On-demand connection to contractor provider during service hours, with an average wait time not to exceed five minutes;
10. Quality and security assurance;
11. Tutors who are professionals and certified in their area. All tutors shall have passed thorough criminal background checks and said checks shall be conducted not less than once per year;
12. Tutors shall be monitored and mentored. Provider shall provide evidence of such to guarantee a quality experience for all users;

13. All tutoring sessions shall be one to one. Sessions involving multiple students are not acceptable;
14. Mobile device access:

The contractor shall have a mobile application or platform for online tutoring available that is compatible with majority of all of the mobile access market.
15. Tutoring sessions in English 24/7 and in Spanish 24/7;
16. Tutoring sessions 360 days of each standard year, and 361 days of each leap year;
17. Services will not be provided on the following dates:
January 1
Easter Sunday
July 4
Thanksgiving Day
December 25

On these holidays, the services close beginning at 1:01 a.m. and reopen at 2:00 p.m. on the following day (all times Eastern).
18. Connectivity--unlimited access points throughout the library system and remotely from users' home with support for proxy server authentication by the library;
19. Reports and Surveys to HPL: reports by the 20th day of the following month during the term of this agreement, stating the usage for the preceding month. Contractor will share all surveys and evaluations from the customers with HPL.
20. Offer training and support to library staff on the usage and promotion of their product, either through a remote method or in-person training;
21. Promotional material to HPL (posters, flyers, and templates for press releases);
22. Allow library staff access to their shared learning platform to conduct in house training, virtual outreaches to the community, and other similar classes for the public.

EXHIBIT "B"

FEE SCHEDULE

| Year | Description | Unit of Measure | Unit Price |
|---------------------------|--|-----------------|-------------|
| One | Complete Online Homework Help & Learning System. | Monthly | \$14,250.00 |
| Two (Option Year, One) | Complete Online Homework Help & Learning System. | Monthly | \$14,250.00 |
| Three (Option Year, Two) | Complete Online Homework Help & Learning System. | Monthly | \$14,250.00 |
| Four (Option Year, Three) | Complete Online Homework Help & Learning System. | Monthly | \$14,250.00 |
| Five (Option Year, Four) | Complete Online Homework Help & Learning System. | Monthly | \$14,250.00 |

PLEASE NOTE THE FOLLOWING REGARDING PRICING:

Pricing is based on an monthly fee for **unlimited use** (as opposed to a per-user or per-session fee)

Contractor does not quote based on session ranges

All services outlined in this contract (include any future set-up, full technical support, training, and outreach)

All upcoming services and enhancements will be included without any additional charge

Software upgrades are provided once a year at no additional charge, are announced in advance, and are distributed automatically (since this service resides on our servers)

EXHIBIT "C"

EQUAL EMPLOYMENT OPPORTUNITY

1. The contractor, subcontractor, vendor, supplier, or lessee will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, or age. The contractor, subcontractor, vendor, supplier, or lessee will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, religion, color, sex, national origin, or age. Such action will include, but not be limited to, the following: employment; upgrading; demotion or transfer; recruitment advertising; layoff or termination; rates of pay or other forms of compensation and selection for training, including apprenticeship. The contractor, subcontractor, vendor, supplier or lessee agrees to post in conspicuous places available to employees, and applicants for employment, notices to be provided by the City setting forth the provisions of this Equal Employment Opportunity Clause.
2. The contractor, subcontractor, vendor, supplier, or lessee states that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex, national origin or age.
3. The contractor, subcontractor, vendor, supplier, or lessee will send to each labor union or representatives of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer advising the said labor union or worker's representative of the contractor's and subcontractor's commitments under Section 202 of Executive Order No. 11246, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
4. The contractor, subcontractor, vendor, supplier, or lessee will comply with all provisions of Executive Order No. 11246 and the rules, regulations, and relevant orders of the Secretary of Labor or other Federal Agency responsible for enforcement of the equal employment opportunity and affirmative action provisions applicable and will likewise furnish all information and reports required by the Mayor and/or Contractor Compliance Officer(s) for purposes of investigation to ascertain and effect compliance with this program.
5. The contractor, subcontractor, vendor, supplier, or lessee will furnish all information and reports required by Executive Order No. 11246, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to all books, records, and accounts by the appropriate City and Federal Officials for purposes of investigations to ascertain compliance with such rules, regulations, and orders. Compliance reports filed at such times as directed shall contain information as to the employment practice policies, program, and work force statistics of the contractor, subcontractor, vendor, supplier, or lessee.
6. In the event of the contractor's, subcontractor's, vendor's, supplier's, or lessee's non-compliance with the non-discrimination clause of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part, and the contractor, subcontractor, vendor, supplier, or lessee may be declared ineligible for further City contracts in accordance with procedures provided in Executive Order No. 11246, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as may otherwise be provided by law.
7. The contractor shall include the provisions of paragraphs 1-8 of this Equal Employment Opportunity Clause in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontractor or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event the contractor becomes involved in, or is threatened with litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.
8. The contractor shall file and shall cause his or her subcontractors, if any, to file compliance reports with the City in the form and to the extent as may be prescribed by the Mayor. Compliance reports filed at such times as directed shall contain information as to the practices, policies, programs, and employment policies and employment statistics of the contractor and each subcontractor.

EXHIBIT D

DRUG POLICY COMPLIANCE AGREEMENT

I, Not Applicable as an owner or officer of
(Name) (Print/Type) (Title)

(Name of Company)

have authority to bind Contractor with respect to its bid, offer or performance of any and all contracts it may enter into with the City of Houston; and that by making this Agreement, I affirm that the Contractor is aware of and by the time the contract is awarded will be bound by and agree to designate appropriate safety impact positions for company employee positions, and to comply with the following requirements before the City issues a Notice to Proceed:

1. Develop and implement a written Drug Free Workplace Policy and related drug testing procedures for the Engineer that meet the criteria and requirements established by the Mayor's Amended Policy on Drug Detection and Deterrence (Mayor's Drug Policy) and the Mayor's Drug Detection and Deterrence Procedures (Executive Order No. 1-31).
2. Obtain a facility to collect urine samples consistent with Health and Human Services (HHS) guidelines and a HHS certified drug testing laboratory to perform the drug tests.
3. Monitor and keep records of drug tests given and the results; and upon request from the City of Houston, provide confirmation of such testing and results.
4. Submit semi-annual Drug Policy Compliance Declarations.

I affirm on behalf of the Contractor that full compliance with the Mayor's Drug Policy and Executive Order No. 1-31 is a material condition of the contract with the City of Houston.

I further acknowledge that falsification, failure to comply with or failure to timely submit declarations and/or documentation in compliance with the Mayor's Drug Policy and/or Executive Order No. 1-31 will be considered a breach of the contract with the City and may result in non-award or termination of the contract by the City of Houston.

Date

Name

Signature

Title

EXHIBIT "E"

**NO SAFETY IMPACT POSITIONS
IN PERFORMANCE OF A CITY CONTRACT**

Alex Sztuden , Director
(Name) (Title)

as an owner or officer of Bramfuse, Inc. (Contractor)
(Name of Company)

have authority to bind the Contractor with respect to its bid, and hereby certify that Contractor has no employee safety impact positions, as defined in §5.18 of Executive Order No. 1-31, that will be involved

in performing Live Homework Assistance
(Project)

Contractor agrees and covenants that it shall immediately notify the City of Houston Director of Personnel if any safety impact positions are established to provide services in performing this City Contract.

7/24/2012
(Date)

Alex Sztuden
(Type or Printed Name)


(Signature)

Director
(Title)

EXHIBIT "F"

DRUG POLICY COMPLIANCE DECLARATION

I, Not Applicable as an owner or officer of
 (Name) (Print/Type) (Title)

(Name of Company)

have personal knowledge and full authority to make the following declarations:

This reporting period covers the preceding 6 months from _____ to _____, 20____.

Initials _____ A written Drug Free Workplace Policy has been implemented and employees notified. The policy meets the criteria established by the Mayor's Amended Policy on Drug Detection and Deterrence (Mayor's Policy).

Initials _____ Written drug testing procedures have been implemented in conformity with the Mayor's Drug Detection and Deterrence Procedures, Executive Order No. 1-31. Employees have been notified of such procedures

Initials _____ Collection/testing has been conducted in compliance with federal Health and Human Services (HHS) guidelines

Initials _____ Appropriate safety impact positions have been designated for employee positions performing on the City of Houston contract. The number of employees in safety impact positions during this reporting period is _____

Initials _____ From _____ to _____ the following test has occurred
 (Start date) (End date)

| | Random | Reasonable Suspicion | Post Accident | Total |
|----------------------------|--------|----------------------|---------------|-------|
| Number Employees Tested | _____ | _____ | _____ | _____ |
| Number Employees Positive | _____ | _____ | _____ | _____ |
| Percent Employees Positive | _____ | _____ | _____ | _____ |

Initials _____ Any employee who tested positive was immediately removed from the City worksite consistent with the Mayor's Policy and Executive Order No. 1-31.

Initials _____ I affirm that falsification or failure to submit this declaration timely in accordance with established guidelines will be considered a breach of contract.

I declare under penalty of perjury that the affirmations made herein and all information contained in this declaration are within my personal knowledge and are true and correct.

DATE _____

(Typed or Printed Name)

(Signature)

(Title)

EXHIBIT "G"

**CERTIFICATION OF AGREEMENT TO COMPLY WITH
PAY OR PLAY PROGRAM**

Available at <http://www.houstontx.gov/obo/popforms.html>